INDEX.

PETITION FOR WRIT OF CERTIORARI 1

I. Summary Statement of the Matter Involved 1

II. Jurisdictional Statement 6

III. The Questions Presented 7

IV. Substantial Importance of the Questions Presented 10

V. Reasons Relied on for the Allowance of the Writ 11

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 15

I. Opinion of the Courts Below 15

II. Jurisdiction 16

III. Statement of the Case 16

IV. The Statute Involved 21

V. Specification of Errors 22

VI. Summary of Argument 23

VII. Argument 24

Point A. The Court of Appeals has rendered a decision in conflict with another decision of the Court of Appeals for the Sixth Circuit in holding that a liability insurance policy endorsement, where issued in compliance with the Federal Motor Carrier Act, and containing coverage and provisions exceeding the requirements of the Act, is void as being repugnant to the Act, as to so much of its coverage and provisions as exceed the requirements of the Act 24

Point B. This is an important question of Federal Law of vital concern to the public, as well as to the public carriers and their insurers and has not been, but should be, settled by this Court ---------- 27

Point C. The Court of Appeals has decided an important question of local law in a way in conflict with the applicable local decisions, holding that where the insurance contract, as amended by endorsement, is subject to two interpretations, is to be given the interpretation most favorable to the insurance company issuing the policy ---------- 28

Point D. This phase of the decision is also in conflict with the applicable decisions of this Court ---------- 30

Point E. The Court of Appeals has sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings, in affirming a decision by the lower Court apparently based, in substantial part, on an issue neither included in the pleadings nor contemplated by the parties ---------- 31

Point F. In this regard, also, the decision of the Court of Appeals is in conflict with the applicable decisions of the Court of Appeals for another Circuit ---------- 33

VIII. Conclusion ---------- 34

TABLE OF AUTHORITIES.

Cases.

Barnett v. Kunkel, et al., 264 U. S. 16 6

Cooper v. United States, 280 U. S. 409 27

Eleogrammennos v. Standard Life Insurance Company, 177 Tenn. 328; 149 S. W. 2d 69 29

Guaranty Trust of New York v. York, 326 U. S. 99 31

I. C. C. v. Kraft Cheese Company, 38 Fed. 764 25

King, Inc. v. Maryland Casualty Company, 161 Tenn. 531; 33 S. W. 2d 57 29

Kustoff v. Stuyvesant Insurance Company, 160 Tenn. 208; 22 S. W. 2d 256 30

Liberty Mutual Insurance Company v. McDonald, 97 Fed. 2d 497 ..... 24, 25

Railroad Company v. Schutte, 103 U. S. 118 27

Royal Insurance Company v. Vanderbilt Insurance Company, 102 Tenn. 264; 52 S. W. 168 28

Stipcich v. Metropolitan Life Insurance Company, 277 U. S. 311 30

Sylvan Beach v. Koch (CCA 8th Circuit), 140 Fed. 2d 852 ..... 13, 33

Text.

Moore's Federal Practice (2nd Ed.), Vol. 3, Paragraph 15.13, pp. 846, 847 34

Statutes and Rules.

FCA, Title 28, Section 1254(1) 6, 16

FCA, Title 28, Section 1332 ..... 6, 16

Federal Declaratory Judgments Act, 28 USC, 400 6

Federal Motor Carrier Act, 1935, U. S. C., Title 49, Sections 301 through 327 21

Federal Rules of Civil Procedure, Rule 15(b) 34

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In the Supreme Court of the United States

No. .....

OCTOBER TERM, 1951.

AMERICAN FIDELITY & CASUALTY COMPANY

and

CAPITAL MOTOR LINES,

Petitioners,

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY,
Successor to
PENNSYLVANIA CASUALTY COMPANY,

and

J. B. LEVAN AND FLORENCE LEVAN, d.b.a.
CHEROKEE MOTOR COACH COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a civil action originally brought in the District Court for the Southern Division of the Eastern District of Tennessee, at Chattanooga, by the American Fidelity and Casualty Company and Capital Motor Lines, petitioners

herein, against the Pennsylvania Casualty Company (now Manufacturers Casualty Insurance Company) and J. B. LeVan and Florence LeVan, d/b/a Cherokee Motor Coach Company, respondents herein. The action was brought to have the Court determine and declare the respective rights of the parties under the provisions of two liability insurance policies involved as the result of a bus accident in which a large number of passengers were injured, necessitating the expenditure of funds totaling approximately Seventy Thousand, Seven Hundred Eighty ($70,-780.00) Dollars for the settlement of resulting claims and suits. (R. 88-90.)

For the sake of brevity we will, at times, hereinafter refer to the parties as follows: to American Fidelity & Casualty Company as "American"; to Capital Motor Lines as "Capital"; to Manufacturers Casualty Insurance Company and Pennsylvania Casualty as "Pennsylvania"; and to J. B. and Florence LeVan, d/b/a Cherokee Motor Coach Company as "Cherokee."

Capital Motor Lines, a motor carrier qualified under the Federal Motor Carrier Act, on or about November 16. 1943, was called upon by a U. S. Military Agent to provide transportation for a group of draftees or selectees from South Pittsburg, Tennessee, to Ft. Oglethorpe, Georgia. (R. 35, 36, 47.) Demands for transportation were exceedingly heavy and this carrier did not have a bus available. It called on the Cherokee Motor Coach Company which provided a forty-one passenger bus and driver (R. 70), under an arrangement whereby Cherokee would receive twenty-five (25¢) cents a mile for the use of the bus and driver, or the entire amount of the ticket value, whichever was the greater. (R. 30.) While the bus was being so operated by a driver on the regular payroll of Cherokee (R. 74) the accident occurred, and a great number of the passengers were injured, some seriously.

Cherokee held a policy of liability insurance with Pennsylvania effective July 3, 1943, providing on the face of the policy, personal injury coverages of Five Thousand ($5,000.00) Dollars for each person and Ten Thousand ($10,000.00) Dollars for each accident; and providing by an endorsement insurance coverage graduated according to the seating capacity, including insurance in the amount of Fifty Thousand ($50,000.00) Dollars for an accident involving a bus seating thirty-one passengers or more. This endorsement was in keeping with, but in some respects exceeded the requirements of the Federal Motor Carrier Act. (See Defendants' "Exhibit 4," and also R. 117, *et seq.*)

This Pennsylvania policy expressly covered "all equipment owned and/or operated by the named assured, Cherokee. The Pennsylvania policy included, in its definition of "insured," the named insured and "any person or organization legally responsible for the use" of the vehicle, "provided the actual use is with the permission of the named insured." (Defendants' Exhibit 4, Insuring Agreement III and R. 113.)

Capital Motor Lines held a policy of liability insurance written by American Fidelity & Casualty Company, which by endorsement, included a provision that "should any other like, valid and collectible insurance issued in the name of the owner or lessor" exist, the policy "becomes excess over and above such valid and collectible insurance." (Plaintiffs' "Exhibit 1" and R. 113.)

A number of passenger claim settlements were first made by representatives of Pennsylvania. Subsequently an agreement was entered into between the two insurance companies and the two bus companies that all claims would be settled within the limits of the respective policies, and that the rights and liabilities of the respective parties might

be subsequently determined. All remaining passenger claims and suits were then settled.

In the District Court the American Fidelity & Casualty Company and Capital Motor Lines sought to recover Twenty-eight Thousand, Nine Hundred Thirty-seven Dollars, Five Cents ($28,937.05) of Pennsylvania Casualty Company and Cherokee Motor Coach Company (R. 5, 6); and Pennsylvania Casualty Company (now Manufacturers) and Cherokee Motor Coach Company filed cross actions seeking to recover Forty-seven Thousand, Three Hundred Fifty-six Dollars, Seventy-seven Cents ($47,356.77) and Twenty-eight Hundred ($2800.00) Dollars respectively, as amounts paid out and expense incurred by them in connection with said settlements. (R. 11.)

The trial was by the Court without a jury, and the Trial Court held that Capital Motor Lines was included as an additional assured in the Pennsylvania policy provisions (R. 116), but limited the coverage as to Capital Motor Lines to the sum of Ten Thousand ($10,000.00) Dollars. (R. 119.) The Trial Court, therefore, entered judgment against Capital and American on the cross action, and against the American and in favor of Pennsylvania in the amount of Thirty-seven Thousand, Thirty-two Dollars, Eight Cents ($37,032.08); and against Capital and in favor of Cherokee in the amount of Twenty-eight Hundred ($2800.00) Dollars. (R. 132.) An appeal from said judgment was taken by American and Capital, and a cross appeal was taken by the other parties, to the Court of Appeals for the Sixth Circuit at Cincinnati, Ohio (R. 134 and R. 137), which Court affirmed the judgment of the District Court in all matters. (R. 145, 146.) American and Capital filed a petition for re-hearing (R. 147), and that petition was denied on June 2, 1951. (R. 185.) No opinion was filed by the Court of Appeals, either in affirm-

ing the Trial Court, or in denying the petition for re-hearing. The Court of Appeals has adopted the opinion and reasoning of the District Court, as found in the Record at pages 111, *et seq.*

The principal questions involved in the appeal were:

(1) Was the arrangement between Capital and Cherokee of such nature as to cause Cherokee to be an independent contractor, or charter party, so that Cherokee and its insurer would be solely liable? Both the Trial Court and the Court of Appeals have answered this question, "No." (We do not here question that part of the decision.)

(2) Was the use of the bus for the purpose in question a use "with the permission of" Cherokee, so as to extend to Capital the benefits of the Pennsylvania policy coverage under its definition of the word "insured." Both the Trial Court and the Court of Appeals have answered this question "Yes." (We agree with this part of the decision.)

(3) Is the amount of the valid and collectible insurance provided by Pennsylvania, under these circumstances, limited to Ten Thousand ($10,000.00) Dollars, or to Fifty Thousand ($50,000.00) Dollars? In other words, is the coverage of American, excess over and above "such valid and collectible insurance" of Ten Thousand ($10,000.00) Dollars or over and above that of Fifty Thousand ($50,000.00) Dollars? The District Court and the Court of Appeals have held the amount of valid and collectible insurance provided by Pennsylvania policy to be only Ten Thousand ($10,000.00) Dollars, and have held American liable for all amounts paid in excess thereof. Petitioners respectfully insist that the Pennsylvania policy limit of Fifty Thousand ($50,000.00) Dollars applies.

II.

JURISDICTIONAL STATEMENT.

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because cases in the Courts of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition of any party in any civil case before or after rendition of judgment or decree. FCA, Title 28, Section 1254(1). The original jurisdiction in the District Court was by reason of diversity of citizenship; FCA, Title 28, Section 1332, and the provisions of the Federal Declaratory Judgments Act, 28 USC, 400. Also, it is believed that the case of *Barnett v. Kunkel, et al.*, 264 U. S. 16, sustains the jurisdiction of this Court, and the review in this Court by a Writ of Certiorari.

The date of the judgment to be reviewed is June 2, 1951. This petition is being filed within ninety (90) days thereafter.

Your petitioner presents to this Court, and files herewith as an Exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the United States Court of Appeals for the Sixth Circuit.

III.

THE QUESTIONS PRESENTED.

The questions herein presented are:

(1)

Where the policy held by the lessee of a bus provides that its insurance shall be excess insurance over and above "the valid and collectible insurance issued in the name of the owner or lessor," and the "owner-lessor's" policy of insurance with an originally stated limit of Ten Thousand ($10,000.00) Dollars has been endorsed for compliance with the Federal Motor Carrier Act to increase that limit to Fifty Thousand ($50,000.00) Dollars, what is the amount of the valid and collectible insurance issued in the name of the owner-lessor? Is it Ten Thousand ($10,000.00) Dollars, or is it Fifty Thousand ($50,000.00) Dollars?

The Courts below have held the amount to be Ten Thousand ($10,000.00) Dollars, and they have held the American Fidelity & Casualty Company, the insurer, covering the lessee, Capital Motor Lines, liable for the excess over the Ten Thousand ($10,000.00) Dollar amount. Petitioners respectfully contend that the amount of valid and collectible insurance issued to the lessor is Fifty Thousand ($50,000.00) Dollars, and that the lessee's insurer is only liable for the amount in excess of Fifty Thousand ($50,000.00) Dollars.

(2)

Where an insurance company issues to a public carrier a policy of liability insurance, the policy showing on its face that the insured is a "bus operator," this policy showing on its face as a limit of liability for any one accident the sum of Ten Thousand ($10,000.00) Dollars; but

an endorsement is made a part of the policy, extending the limit of liability for any one accident to the sum of Fifty Thousand ($50,000.00) Dollars, this endorsement bearing the heading, in part, "For Motor Carriers * * * under Section 115 of Interstate Commerce Act," and containing no definition of terms, but using the same term "the insured," as used and defined in the main policy; does the word "insured," when used in the said endorsement, have another and different meaning from that same term as defined and used in the main policy, so as to exclude the additional insured using a bus owned by the named insured with the permission of the named insured from the extended limits of Fifty Thousand ($50,000.00) Dollars and restrict such additional insured to a coverage of only Ten Thousand ($10,000.00) Dollars?

The Court of Appeals answered this question "Yes." The petitioners respectfully contend that it should be answered "No."

(3)

Where the insurance policy defines the word "insured" to include one using the bus with permission, and makes a distinction between the term "insured," and the more limited term "the named insured," and where the endorsement form printed and used by the insurance company uses the term "the insured," instead of the term "the named insured"; is the term *"the insured"* as used in the endorsement to be construed as limited in its application to "the *named* insured" in disregard of that part of the policy defining terms and specifically defining the unqualified word, "insured"?

The Courts below have answered this question, "Yes." The petitioners contend that this holding is contrary to the decisions of the Courts of last resort of Tennessee, and

of the United States, and that this question should have been answered, "No."

(4)

If, in connection with its obtaining a certificate or permit from the Interstate Commerce Commission, a motor bus operator obtains from a liability insurance company, an endorsement to the liability policy providing valid and collectible insurance broader in its coverage provisions than is actually required under the statutory provisions, is the coverage limited to the strict statutory requirements? In other words, are those provisions which exceed the requirements of the statute, void and invalid as being "repugnant to" the statute?

The Courts below have answered this question "Yes," holding that such repugnancy here exists, and invalidates the additional benefits.

Petitioners respectfully contend that this question should be answered, "No"; that *a policy written by an insurance company to enable a motor carrier to comply with the statute, is valid to the full extent of its contractual provisions even if those provisions exceed the minimum requirements of the statute.*

(5)

Can the District Court, or the Court of Appeals, render a binding, valid decision upon a question or issue which was not included in any of the pleadings, on which no proof was introduced, and which was not even touched upon in arguments or in briefs in the District Court?

The Court of Appeals filed no opinion, but in effect, by affirming the District Judge's opinion and ruling, it answered this question "Yes." Petitioners respectfully contend that this question should have been answered "No."

IV.

SUBSTANTIAL IMPORTANCE OF THE QUESTIONS PRESENTED.

This decision of the Court of Appeals affirming that of the District Court, blasts the very bed rock of the fundamental law of contracts, and unsettles the law as to repugnancy between statutory requirements and contracts. Heretofore, it has been thought and decided that a statute was read into the contract to bring the contract provisions from a lower level up to the higher requirements of the statute. This decision in effect holds that if the contract provides broader or greater provisions than required by the statute, the Courts will whittle down the contract to the bare requirements of the statute. *Such a construction is against the public interest.*

In this day of increasing use of motor carrier equipment, interchange agreements, and of leasing of busses and trucks by one carrier to another, it is highly important to the public, to the carriers, and to the insurance companies, that the uncertainties and conflicts in the decisions bearing on these questions raised by this case be clarified and finally determined.

The questions presented in the instant case are of substantial importance in that:

(1) The rights of the traveling public and of a great number of motor carriers and their insurers will be affected by the decision.

(2) An unsound and intolerable precedent would be established as to construction of insurance contracts.

(3) The Court of Appeals decision would establish a dangerous precedent for the decision of cases and issues not even thought of or considered in the pleadings, proof and briefs.

V.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.

The Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, in that:

The Court of Appeals has held in effect that an endorsement to a liability insurance policy issued to a public carrier in connection with its compliance to the Federal Motor Carrier Act, is to be strictly construed in favor of the issuing company and any terms or provisions therein included in excess of or beyond the requirements of the statute, are to be treated as invalid, as being repugnant to the statute, even though there is no wording in the insurance policy or endorsement clearly restricting its coverage and application to the bare requirements of the statute.

2.

The Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions, and contrary to the decisions of this Court, in that:

Instead of construing the insurance policy issued by the Pennsylvania Casualty Company according to its wording, and instead of giving to its terms and wording the meaning commonly and generally attributed to them, the Court has restricted and limited those terms and wording, and their meaning, to the benefit of the insurance company preparing and providing the contract, and contrary to the definitions expressly stated in the policy provisions.

3.

The Court of Appeals has decided a Federal question in a way which petitioners believe to be in conflict with the applicable decisions of this Court.

4.

The Court of Appeals has so far sanctioned a departure by the lower Court from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision, in that:

The lower Court included as a reason for its decision a supposed right of subrogation or reimbursement, thus in effect finally determining that in this cause such reimbursement be allowed, when this question of reimbursement was not included in any way in any of the pleadings, no proof was introduced on this question, the amount of premium paid and the extent of coverage usually and legally provided for by such premium was not shown in evidence, and there was no evidence as to whether or not the said reimbursement clause was intended to apply to the amount of payment, or merely to payments of any amount where there had been a breach of the terms of the policy or some equitable defense as between the "insured" and the insurance company.

5.

In connection with the matter of issues not within the pleadings and considerations of the parties, the Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter. The Court of Appeals for the Eighth Circuit has held that the Court cannot consider issues not within the pleadings and beyond the scope of the relief demanded.

Please see *Sylvan Beach v. Koch* (CCA 8th Circuit), 140 Fed. 2d 852.

WHEREFORE, your petitioners pray, that a Writ of Certiorari issue under the seal of this Court, directed to the Court of Appeals for the Sixth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record, and of the proceedings of the said Court of Appeals had in the cases numbered and entitled on its docket Number 11249, American Fidelity & Casualty Company and Capital Motor Lines, Appellants, vs. Pennsylvania Casualty Company, et al., Appellees; and Number 11250, Manufacturer's Casualty Insurance Company (successor to Pennsylvania Casualty Company) Appellant, vs. American Fidelity & Casualty Company, et al., Appellees; to the end that these causes may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

AMERICAN FIDELITY & CASUALTY COMPANY and
CAPITAL MOTOR LINES,

By S. BARTOW STRANG,
Counsel for Petitioners.

JOHN S. CARRIGER,
FORREST S. SMITH,
Of Counsel.

In the Supreme Court of the United States

No. .....

OCTOBER TERM, 1951.

AMERICAN FIDELITY & CASUALTY COMPANY

and

CAPITAL MOTOR LINES,

Petitioners,

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY,
Successor to
PENNSYLVANIA CASUALTY COMPANY,

and

J. B. LEVAN AND FLORENCE LEVAN, d.b.a.
CHEROKEE MOTOR COACH COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURTS BELOW.

No opinion was filed by the Court of Appeals. That Court adopted and affirmed the opinion of the District Court which is found in the Record, commencing at page 111. This opinion was filed in the District Court for the Eastern District of Tennessee, Southern Division on February 8, 1950. We are informed that this opinion will be reported but the citation is not yet available.

II.

JURISDICTION.

The date of the final judgment to be reviewed is June 2, 1951. It was on that date that the United States Court of Appeals denied the petition for rehearing theretofore filed in that Court.

The original jurisdiction in the District Court was by reason of diversity of citizenship, as provided for by the Federal Statutes. U. S. C., Title 28, Section 1332.

The United States Supreme Court has jurisdiction to review the judgment herein questioned because cases in the Courts of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted on the petition of any party in any civil case before or after rendition of judgment or decree. U. S. C., Title 28, Section 1254(1).

III.

STATEMENT OF THE CASE.

The facts are not in controversy and are disclosed upon the face of the Record.

The names of the parties will be abbreviated, and we will refer to them as we did in the petition.

Cherokee Motor Coach Company obtained from Pennsylvania an automobile liability policy which showed on its face that it was countersigned on July 2, 1943 at Chattanooga, Tennessee, and that it was filed with the I. C. C. This policy further showed the occupation of the named insured to be "bus operator," and that the policy was to cover "all equipment owned and/or operated by the named insured."

The limits stated on the original face of the policy were Five Thousand ($5,000.00) Dollars for each person and Ten Thousand ($10,000.00) Dollars for each accident.

However, there was attached to and made a part of this policy an endorsement headed "Endorsement for Motor Carrier Policies of Insurance for Bodily Injury Liability and Property Damage Liability Under Section 315 of Interstate Commerce Act." This policy, including the endorsement, was filed as Defendants' Exhibit 4. (R. 58.) The pertinent language of the endorsement other than the amounts specified therein, appears in the opinion of the District Court. (R. 117.) By this endorsement the limit for bodily injuries or death of all persons injured or killed in any one accident was increased to the sum of Fifty Thousand ($50,000.00) Dollars as to a bus of thirty-one passengers or more.

This Pennsylvania policy set out in its "Insuring Agreement" certain definitions. One of these was as follows:

> *"III. Definition of 'Insured.'* The unqualified word 'insured' wherever used in coverages A and B and in other parts of this policy, when applicable to such coverages, includes the named insured and, *except where specifically stated to the contrary,* also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured." (Emphasis added.)

In the endorsement by which the coverage amount is increased to Fifty Thousand ($50,000.00) Dollars for any one accident, Pennsylvania has consistently and exclusively used the term "the insured."

In one section of the said endorsement, it is provided: "The liability of the Company extends to such losses, damages, injuries or deaths whether occurring on the route or in the territory authorized to be served by the insured or elsewhere, except as follows: *No exceptions.*"

Capital Motor Lines held a policy of automobile liability insurance issued by the American Fidelity & Casualty Company. A "hired car" endorsement to this policy extended it to cover buses "hired by the named assured"; but by Paragraph 4 of said endorsement it was provided that "should any other like, valid and collectible insurance issued in the name of the owner or lessor or in favor of the named insured herein, exist, *this policy becomes excess over and above such valid and collectible insurance.*" (Defendants' Exhibit 1; R. 25.) This provision is also quoted in the opinion of the District Court commencing at the bottom of page 113.

Following the accident, representatives of Pennsylvania made settlement of the claims of eighteen of the passengers. (R. 88.) Subsequently by agreement entered into by and between the parties, the claims and suits of all remaining passengers were settled. All told, Pennsylvania Casualty Company paid out Forty-seven Thousand, Three Hundred Fifty-six Dollars, Seventy-seven Cents ($47,356.77) and Cherokee Twenty-eight Hundred ($2800.00) Dollars; and American Fidelity & Casualty Company paid out Twenty-eight Thousand, Nine Hundred Thirty-seven Dollars, Five Cents ($28,937.05), in connection with the settlements, and expenses incidental thereto.

Suit was filed in the District Court for the Eastern District of Tennessee, Southern Division by American and Capital against Pennsylvania and Cherokee, it being insisted by American and Capital that Pennsylvania is liable to the full extent of the Fifty Thousand ($50,000.00) Dollars in valid and collectible insurance coverage provided by its policy. (R. 2, 6.)

Pennsylvania (now Manufacturers) and Cherokee, in their Answer and counter claim, and throughout the trial, insisted *that they were not liable for any amount,* but if

they were liable at all *"they would be liable for only one-half" of the total amounts paid by Pennsylvania and American.* (R. 13 C. and D.) Pennsylvania and Cherokee therefore sought, in the counter claim, to recover against American.

The case was tried by the District Court without a jury on these issues.

The District Judge first held American and Capital solely liable for all losses, declaring that Capital was not using the bus in question "with the permission" of Cherokee, and that Capital was therefore not an additional insured under the Pennsylvania policy. (R. 104-109.)

American and Capital filed a motion to set aside these findings and conclusions and for a new trial, and the Court granted this motion and revised its findings and conclusions and judgment to the extent of holding that Capital Motor Lines was an additional insured under the omnibus provisions of the Pennsylvania policy; but the Court limited the extent of Pennsylvania's coverage to the sum of Ten Thousand ($10,000.00) Dollars, and held American Fidelity & Casualty Company liable for all amounts paid in settlement of suits and claims in excess of that sum. (R. 111-120.) The opinion of the District Court on the said motion for a new trial has been referred to and approved and affirmed by the United States Court of Appeals for the Sixth Circuit.

In that opinion the District Court held:

(1) That the word "insured" as used in the endorsement extending the amount of the coverage to Fifty Thousand ($50,000.00) Dollars must be defined and "paraphrased" to mean the "motor carrier" which obtained the permit from the I. C. C. The Court said:

> "The 'insured' was intended to mean the motor carrier operating the vehicle under the particular

permit with respect to which the insurance coverage was provided." (R. 119.)

In this same connection the Court said:

> "In other words, where insurance was taken, as here, for the purpose of obtaining a permit or certificate of public convenience and necessity under the Act, the provisions of the Act enter into and become a part of the policy of insurance; and such statutory provisions override and supersede anything in the policy repugnant to such provisions."

The District Court also said:

> "The word 'insured' in this endorsement must, therefore, be interpreted to mean the 'motor carrier' operating the vehicle under the permit with respect to which the insurance was provided and not the meaning given under the extended coverage clause."

(2) The District Court further held, without regard to the definition of the word "insured" in the endorsement, that:

> "the coverage is limited to the provisions of the endorsement even though in conflict with other parts of the policy; that by reason of the endorsement there arises no liability unless the vehicle is being operated under the permit issued to the named insured motor carrier."

(3) As a third ground for the opinion the District Court relied on a provision in the endorsement which the District Court said:

> "Expressly provides for reimbursement to the insurer * * * for any payment that the company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement."

Actually the full wording of that paragraph of the endorsement is as follows:

"The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit *involving a breach of the terms of the policy* and for any payment that the company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement." (Emphasis added.)

No such claim for reimbursement had been presented, and this issue was not in any way before the Court in this litigation.

We have sought to amplify and clarify the Summary Statement of the matter involved, as set forth in the preceding Petition. That Statement is hereby adopted and made a part of this Brief.

IV.

THE STATUTE INVOLVED.

The Federal Motor Carrier Act, 1935, is found in U. S. C., Title 49, Sections 301 through 327.

The provisions pertinent here are found in Section 315, which provides in part as follows:

"No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, in such reasonable amount as the Commission may require, conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles un-

der such certificate or permit, or for any loss or damage to property of others."

V.

SPECIFICATION OF ERRORS.

(1) The United States Court of Appeals erred in affirming the District Court and in holding that the meaning of the word "insured" in the endorsement made a part of the Pennsylvania policy must be restricted to mean "the motor carrier operating the vehicle under the particular permit with respect to which the insurance coverage was provided" (in this instance, Pennsylvania). (R. 118.)

(2) The United States Court of Appeals erred in affirming the District Court and in holding that the Statutory provisions of the Motor Carrier Act of 1935 were repugnant to the liability insurance policy definition of the term "insured" and that the word "insured" in this endorsement must, therefore, be interpreted to have the meaning "the motor carrier" operating the vehicle under the permit with respect to which the insurance was provided, and not the meaning given under the extended coverage clause. (R. 118-119.)

(3) The United States Court of Appeals erred in affirming the District Court and in holding that the endorsement to Pennsylvania's liability insurance policy is strictly limited in its application to the "named insured," Cherokee, in disregard of the definitions expressly provided in the policy, even though the endorsement uses the term "the insured," rather than, "the named insured"; and in holding that "under the endorsement there arises no liability unless the vehicle is being operated under the permit issued to Cherokee, the named insured motor carrier. (R. 119.)

(4) The United States Court of Appeals erred in affirming the District Court and in holding that the Manufacturers Casualty Company might avail itself of a "reimbursement" provision in the endorsement, even though that provision, or supposed cause of action, had not been anywhere relied on or referred to in the pleadings, was not an issue in the Trial Court, was not contemplated in the proof, and was not included in the argument or briefs; and even though the meaning of the provision itself does not clearly appear from its wording. (R. 119.)

VI.

SUMMARY OF ARGUMENT.

Point A: The Court of Appeals has rendered a decision in conflict with another decision of the Court of Appeals for the Sixth Circuit in holding that a liability insurance policy endorsement, where issued in compliance with the Federal Motor Carrier Act, and containing coverage and provisions exceeding the requirements of the Act, is void as being repugnant to the Act, as to so much of its coverage and provisions as exceed the requirements of the Act.

Point B: This is an important question of Federal Law of vital concern to the public, as well as to the public carriers and their insurers, and has not been, but should be, settled by this Court.

Point C: The Court of Appeals has decided an important question of local law in a way in conflict with the applicable local decisions, in holding that where the insurance contract, as amended by endorsement, is subject to two interpretations, it is to be given the interpretation most favorable to the insurance company issuing the policy.

Point D: This phase of the decision is also in conflict with the applicable decisions of this Court.

Point E: The Court of Appeals has sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings, in affirming a decision by the lower Court apparently based, in substantial part, on an issue neither included in the pleadings nor contemplated by the parties, thus calling for this Court's exercise of its power of supervision.

Point F: In this regard, also, the decision of the Court of Appeals is in conflict with the applicable decisions of the Court of Appeals for another Circuit.

VII.

ARGUMENT.

Point A.

The Court of Appeals has rendered a decision in conflict with another decision of the Court of Appeals for the Sixth Circuit in holding that a liability insurance policy endorsement, where issued in compliance with the Federal Motor Carrier Act, and containing coverage and provisions exceeding the requirements of the Act, is void as being repugnant to the Act, as to so much of its coverage and provisions as exceed the requirements of the Act.

A similar question was once made concerning a policy of insurance issued in compliance with a State regulation concerning a motor express company in the case of *Liberty Mutual Insurance Company vs. McDonald,* 97 Fed. 2d 497. The Court, in referring to the insurance company, there pointed out:

> "If the contract it wrote was too limited to protect the public, the statutory provisions superseded it to the extent necessary to make it adequate for public security." (p. 498.)

But the Court then made it clear that:

> *"This rule provides minimum but not maximum coverage.* Under it the insurer may limit his liability to Ten Thousand ($10,000.00) Dollars for the death of more than one person in any one accident, but it is not compelled to do so."
>
> *Liberty Mutual Insurance Company vs. McDonald,* 97 Fed. 2d 497, 499.

Likewise, it has been held that a motor carrier did not violate the provisions of the Federal Motor Carrier Act by procuring insurance policies protecting it, in excess of the minimum limits required by the Interstate Commerce Commission against the carrier's legal liability.

I. C. C. vs. Kraft Cheese Company, 38 Fed. 764.

The fact that a provision in an insurance contract goes further than is required by a Statute, under or by reason of which the contract is entered into, does not render that contract repugnant to the Statute, unless the Statute expressly or clearly prohibits such additional provisions. In the absence of such a prohibiting clause, one who is the beneficiary under or who is an insured under the policy provisions, may have the full benefit of the policy or endorsement benefits even though they exceed the statutory requirements.

In the case here before the Court *there is no such repugnancy* between the Statute and the policy contract as to require the contract to be restricted or limited in its application.

The lower Courts have possibly overlooked the fact that Pennsylvania, in wording its endorsement, specifically refused to limit its application. The endorsement form included the provision:

> "The liability of the company extends to such losses, damages, injuries or deaths whether occurring

on the route or in the territory authorized to be served by the insured *or elsewhere,* except as follows: *No exceptions.*" (R. 117, commencing at the bottom of the page.) (Also see Defendants' Exhibit 4.)

As will appear from the original exhibit, a blank was left following the words "except as follows: ", in which the insurance company could have limited the application of the endorsement. Pennsylvania filled in this blank with the words—*"No exceptions."*

Pennsylvania could there have written as an exception, "injuries or deaths occurring beyond or outside the scope of the permits or certificates of the named insured"; or even more clearly could have written "all injuries or deaths occurring beyond or outside the scope of the permits or certificates of the named insured are excepted and not covered hereunder."

Also, apparently the lower Courts overlooked the provision in the second paragraph of the said endorsement stating that it would apply to losses resulting from the negligent operation, maintenance, or use of the motor vehicle under certificate of public convenience and necessity or permit *issued to the insured* by the Interstate Commerce Commission, *or otherwise under the Interstate Commerce Act* within the limit of liability hereinafter provided.

Thus by its own action and its own choice of terms, and by its use throughout the endorsement of the words "the insured" instead of the words "the named insured," Pennsylvania extended its coverage beyond the actual requirements of the Statute. This is not such a repugnancy as required the Court to revamp the contract.

Point B.

This is an important question of Federal Law of vital concern to the public, as well as to the public carriers and their insurers and has not been, but should be, settled by this Court.

We have not found any decision of this Court directly in point. The general line of reasoning of the decisions of this Court is opposed to that followed by the lower Court in this case.

The Court of Appeals has held in effect that such an endorsement is to be strictly construed *in favor of the issuing insurance company.*

This is certainly contrary to the reasoning followed by the Supreme Court, where it has said:

> "And here it is proper to say that contracts created by, or entered into under, the authority of the Statutes are to be interpreted according to the language used in each particular case to express the obligation assumed. Where the State is concerned, the words employed are sometimes to be taken more strongly against the other party, but in this, as in other cases of contracts, language is to be given, if possible, its usual and ordinary meaning. The object is to find out from the words used what the parties intended to do. Every Statute like every contract, must be read by itself, and it no more follows that one statutory contract is like another than that one ordinary contract means what another does."
>
> *Railroad Company vs. Schutte,* 103 U. S. 118, 140.

Likewise, this Court has held:

> "This rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense."
>
> *Cooper vs. United States,* 280 U. S. 409.

Point C.

The Court of Appeals has decided an important question of local law in a way in conflict with the applicable local decisions, holding that where the insurance contract, as amended by endorsement, is subject to two interpretations, is to be given the interpretation most favorable to the insurance company issuing the policy.

The Court of Appeals has decided an insurance contract question by construing the contract contrary to the principles established by the Tennessee Courts to govern such interpretation of contracts, and in conflict with the provisions of the Tennessee Courts in this connection.

The Court of Appeals has held, in effect, that the definition in the main body of the insurance policy is to be disregarded in the endorsement made a part of the policy, and that the terms used in the endorsement, although in the same words as, and although defined in the policy, are to be given an entirely different meaning, wherever they occur in the endorsement.

In other words, the Court of Appeals has shown that the wording of the endorsement is subject to two interpretations, and has held that it should be given the interpretation most favorable to the insurance company issuing the policy.

This is directly contrary to the Tennessee rule, as well as to the prevailing fundamental rule as voiced by this Court. The rule in Tennessee is that:

> "The conflicting or doubtful provisions of the insurance policy are construed more strongly against the company issuing the policy."
>
> *Royal Insurance Company vs. Vanderbilt Insurance Company*, 102 Tenn. 264 (Headnote 3); 52 S. W. 168.

This case is cited with approval in a later Tennessee case where the Supreme Court of the State in its opinion said:

> "Our cases are all to the same effect. The rule applies in all insurance cases when the contract has been 'so framed as to make necessary a judicial construction.' "
>
> *King, Inc. vs. Maryland Casualty Company,* 161 Tenn. 531, 534; 33 S. W. 2d 57.

In a recent case the Tennessee Supreme Court has stated:

> "It is the duty of the Courts to enforce contracts according to their plain terms."
>
> *Eleogrammennos vs. Standard Life Insurance Company,* 177 Tenn. 328, 334; 149 S. W. 2d 69.

The Court of Appeals, however, has held that the definition of the term "the insured" in the principal policy does not apply to the use of the same term, "the insured," as it appeared in the endorsement prepared, printed and completed by the insurance company, and attached to and made a part of that policy.

Possibly the lower Courts overlooked that part of the definition of "insured" found in the Pennsylvania policy, stating

> "the unqualified *word 'insured' whenever used* in coverages A and B *and in other parts of this policy,* when applicable to such coverages, includes the named insured and, *except where specifically stated to the contrary,* also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured." (Defendants' Exhibit 4, Insuring Agreement III.) (R. 58.) (Emphasis added.)

The construction given by the lower Courts in this case is absolutely contrary to the Tennessee rules as to the construction of insurance policies.

It is to be noted that the Pennsylvania policy was counter signed and delivered in Tennessee to residents of Tennessee, and therefore was a contract made in Tennessee and to be construed under Tennessee law.

In this respect Tennessee follows the majority rule that:

> "An insurance contract is to be interpreted by the law of the place where the contract was made, and ordinarily where the policy is dependent for validity on the counter signature and delivered by the local agent, the place of the contract is fixed by the place where the agent counter signed and delivered it."
>
> *Kustoff vs. Stuyvesant Insurance Company,* 160 Tenn. 208 (Headnote 3); 22 S. W. 2d 256.

Point D.

This phase of the decision is also in conflict with the applicable decisions of this Court.

> "But narrow and unreasonable interpretations of clauses in an insurance policy are not favored. They are prepared by the insurer, and if with equal reason, open to two constructions, the most favorable to the insured will be adopted."
>
> *Stipcich vs. Metropolitan Life Insurance Company,* 277 U. S. 311, 322.

Also, this Court has held:

> "The source of substantive rights enforced by a Federal Court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State,

whether its voice be the Legislature or its highest Court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a Federal Court * * *."

Guaranty Trust of New York vs. York, 326 U. S. 99.

Point E.

The Court of Appeals has sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings, in affirming a decision by the lower Court apparently based, in substantial part, on an issue neither included in the pleadings nor contemplated by the parties.

The Courts below went too far beyond the usual course of judicial proceedings. In effect, they awarded a reimbursement by Capital to Pennsylvania on an issue not within the pleadings, and not contemplated by the parties during the trial or in the briefs and arguments.

American and Capital in their original complaint, insisted that the "Pennsylvania Casualty Company was obligated under the provisions of its insurance policy contract to defend complainant, Capital Motor Lines, in all suits and claims made and presented against it, and to make settlement of said suits and claims within the limits of its policy," (R. 5(V)(3)), and that Pennsylvania was liable to the full extent of its limits of Fifty Thousand ($50,000.00) Dollars.

In its Answer and Counter Claim, Pennsylvania first insisted that Capital and American were solely liable for all damages; and in the alternative insisted "that at most they (Pennsylvania) would be liable for only *one-half of the amounts" paid out in the settlement of all the claims and suits.* (R. 13 (C).)

Also, in part D of its Answer and Counter Claim Pennsylvania contended that in the event it was liable for any amount, it "should have contribution from the complainants for any and all amounts which they had paid or do pay over and above *one-half of the total liability* agreed upon or fixed by the Court." (R. 13.)

The theory relied upon by the Trial Court (R. 119) and affirmed by the Court of Appeals came as a complete surprise.

The reimbursement provision in the endorsement to Pennsylvania's policy had never been mentioned in the pleadings, in the trial, or in the briefs.

In fact, that clause itself in the endorsement is not clear as to its meaning. When construed as a whole, with consideration given to the punctuation, it is clear that the primary objective was to protect Pennsylvania and to provide reimbursement in connection with cases involving "a breach of the terms of the policy." In other words, if, by reason of endorsement and the Federal Statute the insurer was compelled to pay a claim where the insurance company had failed to cooperate, or had made fraudulent representations, or where there was some other breach of contract, Pennsylvania reserved its right to obtain a reimbursement.

To give due consideration to this issue, if and when properly presented, it would be necessary for the Court to have before it full information as to the amount of premiums paid, the intention of the parties, the customs and practices in connection with this part of the endorsement, and all the facts showing the actual intention of the parties. If, as seems clear here, the minimum monthly premium of One Thousand ($1,000.00) Dollars per month required of Cherokee by Pennsylvania, was the proper premium for a policy of limits of Fifty Thousand ($50,-

000.00) Dollars instead of Ten Thousand ($10,000.00) Dollars, then Pennsylvania could not equitably and properly prevail in seeking such reimbursement.

The Court of Appeals decision would establish a dangerous precedent for the decision of cases on issues which had not been duly tested in the searching heat of fact and argument; and on issues which may not even have been thought of by the parties or their counsel.

In sanctioning and affirming a decision based, in part, on such an undeveloped theory, the Court of Appeals sanctioned such a departure from the accepted and usual course of judicial proceedings as should not be countenanced, and calls for an exercise of this Court's power of supervision.

Point F.

In this regard, also, the decision of the Court of Appeals is in conflict with the applicable decisions of the Court of Appeals for another Circuit.

In taking into consideration an issue not within the pleadings, the Court of Appeals for the Sixth Circuit is directly in conflict with a decision of the Court of Appeals for the Eighth Circuit.

The holding of the Court of Appeals for the latter Circuit on this point is summarized as follows:

> "Unless all parties in interest are in Court and have voluntarily litigated some issues not within the pleadings, the Court can consider only issues made by the pleadings, and judgment may not extend beyond such issues nor beyond the scope of the relief demanded."
>
> *Sylvan Beach vs. Koch*, 140 Fed. 2d 852 (Headnote 17).

This reasoning is supported by James William Moore in his able comments on Rule 15(b) of the Federal Rules of Civil Procedure. Mr. Moore says:

> "The purpose of an amendment to conform to proof is to bring the Pleadings in line with the actual issues upon which the case was tried; therefore, an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment. This principle is sound, since it cannot be fairly said that there is any implied consent to try an issue where the parties do not squarely recognize it as an issue in the trial."
>
> *Moore's Federal Practice* (2nd Ed.), Vol. 3, Paragraph 15.13, pp. 846, 847.

VIII.

CONCLUSION.

The decision of the lower Courts in this case is against the public interest.

If this decision is allowed to stand it becomes a precedent for a unwarranted limitation on or restriction upon the rights intended to be afforded the public under the Motor Carrier Act. This can be shown by an illustration.

Assume that in this accident a number of the selectees had been killed, and that judgments totaling One Hundred Thousand ($100,000.00) Dollars had been obtained. Now assume that each of the two bus companies held policies exactly like Pennsylvania's, and that all other facts were similar to those before the Court. If the decision of the lower Courts is correct, Pennsylvania would escape all liability above the sum of Ten Thousand ($10,000.00) Dollars, and the injured parties would have insurance

protection for only sixty (60%) percent of the total amount of their claims.

This decision is therefore one of substantial importance to the public.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing said decision.

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No. 268.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

AMERICAN FIDELITY & CASUALTY COMPANY and CAPITAL MOTOR LINES,
Petitioners,

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY, etc., and J. B. LEVAN et al.,
Respondents.

RESPONSE

Of Manufacturers Casualty Insurance Company to Petition for Certiorari.

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INDEX.

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
No substantial importance of question involved	3
Statement of the case	4
The parties	4
The accident	4
The suit	5
The facts	6
Alleged reasons for allowance of writ	8
Argument	10
Point A: So far as public is concerned statute is read into policy, otherwise parties may make such contract as they choose	10
I. C. C. endorsement prescribed by regulation	10
Point B: No question of Federal law involved or decided	11
Point C: No improper construction of the policy	12
Point D: (This is vague and uncertain.)	14
Point E: There was no issue decided outside the pleadings	14
Point F: Substantially same as above	16
Adversary's conclusion	16
Conclusion	17

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TABLE OF AUTHORITIES.

Cases.

Liberty Mutual Ins. Co. v. McDonald, 97 F. 2d 497.... 10
Railroad Co. v. Schutte, 103 U. S. 118, 140..... 12

Statute.

49 U. S. C. A., Section 308 (b)..... 11
Section 308 (c)..... 11
Section 315.....9, 10

Regulation.

49 C. F. R., Section 174.7.....9, 10

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RESPONSE

Of Manufacturers Casualty Insurance Company to Petition for Certiorari.

1.

OPINIONS BELOW.

The opinion of the District Judge is found on R. 111, et seq.; findings of fact and conclusions of law on R. 120, et seq.; judgment of the Court of Appeals, R. 145-6; order denying petition to rehear, R. 185. The Court of Appeals rendered no opinion.

2.

JURISDICTION.

The jurisdiction of this Court is admitted.

3.

QUESTION PRESENTED.

It seems to us there is only one question presented:

Where a public liability insurer issues a policy to a common carrier, with basic limits of $5,000.00 and $10,000.00, and later, in compliance with the statute, found 49 U. S. C. A., Section 315, attaches thereto an endorsement required by the Interstate Commerce Commission, with a limitation of amount of $50,000.00, for the size of bus involved, while operated under the certificate of convenience and necessity issued to the insured by the Interstate Commerce Commission, does the insurer of a lessee of a bus covered by such insurance take, under the omnibus clause, benefits to the extent **only** of the basic limits of the policy, or to the **greater** extent of the limits of the I. C. C. endorsement, where the accident in question arose while the bus was being operated under the I. C. C. permit of the lessee rather than under the permit of the insured lessor?

We insisted in the Courts below **(and they agreed with us)**, on behalf of the present respondents, that the basic limits applied to the lessee as an "other insured" under the omnibus clause hereinafter mentioned. Petitioners insisted the $50,000.00 limits applied. Such is the main question.

4.

NO SUBSTANTIAL IMPORTANCE OF QUESTION INVOLVED.

There is no Federal question involved; and, contrary to the statements of adversary counsel, there has been no blasting of the bed rock of the law of contracts, nor any unsettling of the law as to repugnance between statutory requirements and contracts. See opinion on motion for new trial, R. 116-120; findings of fact and conclusions of law, R. 120-124. The theory of the District Judge, **affirmed without opinion**, is found on R. 116 (bottom), et seq. See, also, R. 146. The petition to rehear was limited to substantially this ground. R. 149, et seq., and reply, R. 169, et seq.

The Courts below decided that the bus was in effect Capital's bus, the driver its servant, and the bus was being operated under Capital's permit. R. 107 (1 and 2); R. 114. Capital's insurance company (American) therefore could not secure under the omnibus clause of Cherokee's policy (issued by Pennsylvania) greater benefits than Cherokee could have secured—the basic limits—since Cherokee was not operating the bus under its certificate, and consequently the endorsement increasing the liability to $50,000.00 did not apply. The Courts decided, in effect, that as between the insurance companies the $10,000.00 limitation in Pennsylvania's policy was effective. Since the decision, as well as before, motor carriers and insurance companies may, as between themselves, contract as they choose.

AGE BLEED THRU

STATEMENT OF THE CASE.

The Parties.

This brief is filed on behalf of Manufacturers Casualty Insurance Company, successor to Pennsylvania Casualty Company.

Cherokee Motor Coach Company was a partnership composed of J. B. Levan and wife, engaged in business as a common carrier of passengers. It is herein referred to as Cherokee.

Pennsylvania Casualty Company (now Manufacturers Casualty Insurance Company, as above stated) was engaged in the casualty insurance business, and issued the policy covering the public liability of Cherokee. It is herein called Pennsylvania.

Capital Motor Lines is a corporation engaged in business as a common carrier of passengers, and is herein referred to as Capital.

American Fidelity & Casualty Company is engaged in the casualty insurance business, and issued the policy covering Capital. It is herein referred to as American.

The above designations were used by the District Judge and by the parties in prior proceedings.

The Accident.

On November 16, 1943, Capital had a request from a Government agency to transport a number of draftees from South Pittsburg, Tennessee, to Fort Oglethorpe, Georgia. Capital did not have the equipment necessary to handle this business in addition to its regular schedules. It obtained a bus and driver from Cherokee. Previ-

ously, it insisted that Cherokee was an independent contractor for these purposes, but that theory is now abandoned. See petition, page 5. On the trip in question, the accident happened, details of which are not material, except that many of the draftees were injured, and Pennsylvania and American paid, in unequal shares, something more than $70,000.00 to the injured persons; and the carriers each paid $2800.00.

During the making of these payments, in settlement of claims and suits, stipulations were entered into among the parties, wherein it was provided that all parties reserved all rights against the others, and that it was the expectation that each would sue the other to enforce those rights. R. 88-98.

This Suit.

When the claims and suits of the passengers had been settled, and the costs, fees and expenses paid, American and Capital sued Cherokee and Pennsylvania, in the District Court. R. 2-7. The theory of the suit, in general, was that Cherokee was liable for the damages; that it and Pennsylvania should have paid the passengers and incidental expenses; that as Capital and American paid some of them, under the aforesaid stipulation and agreement, they should recover from Cherokee and Pennsylvania the amount paid.

Cherokee and Pennsylvania defended upon the general theory that at the time of the accident the bus was in effect Capital's bus (it having rented the bus for the trip in question) and that the driver was Capital's driver (under the loaned servant theory); therefore, that Capital and American were liable for the damages. R. 7-10.

There was a counterclaim for what Cherokee and Pennsylvania paid on claims for damages, and expenses. R. 11-15.

The District Judge held that the bus was in effect Capital's bus, and that the driver was Capital's servant. R. 107, 123. The Court of Appeals affirmed this decision and judgment without opinion. R. 145-6. Petition for rehearing was filed, R. 147, was answered, R. 169, and was overruled without opinion, R. 185.

The Facts.

It appears that the material facts are not disputed, now that the independent contractor theory is out of the case. Capital obtained the bus and driver as we have said above. Petition, page 2. Cherokee held a policy of liability insurance with Pennsylvania, providing, on its face, for $5,000.00 in case of single injury, and $10,000.00 for multiple injuries or deaths; there was attached to it an I. C. C. endorsement. See Defendant's Exhibit 4; also R. 116, and quotation of endorsement on R. 117-118. The limits of this I. C. C. endorsement, under the circumstances, so far as the public was concerned, were $50,000.00. Petition, page 3.

The policy insured the bus in question, and contained an omnibus clause reading as follows:

> "III. Definition of 'Insured.'
>
> "The unqualified word 'insured' wherever used in coverages A and B and in other parts of this policy, when applicable to such coverages, includes the named insured, and, except where specifically stated to the contrary, also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured," etc. Quoted from R. 123.

Capital held a policy in American which provided, by endorsement, that it extended to and covered any hired or

leased equipment, in consideration of a premium to be paid therefor, R. 123; and said endorsement also contained this provision:

> "It is further understood and agreed, subject to the conditions of the previous paragraph, that should any other like, valid and collectible insurance issued in the name of the owner or lessor or in favor of the named Assured herein, exist, this policy becomes excess over and above such valid and collectible insurance."

It appears that Capital had received payment from the Government for this trip, R. 38, Q. & A. 14, and that the amount so paid was taken into consideration in paying the premium to American. R. 39, Q. & A. 15. Cherokee received nothing for the use of its bus on that occasion, R. 28, Q. & A. 34, although it was customary to pay. Mr. Schaeffer, attorney for Cherokee, kept the ticket in his pocket, as evidence, instead of turning it in. R. 86, R. D. 1.

There is much evidence in the record regarding the conversation when the arrangement for the bus was made, what the driver did with respect to taking the bus to South Pittsburg for Capital, and returning the draftees after he was directed by Capital where to get them, and after Capital gave him the ticket, to whom he reported in Chattanooga, what instructions he received, etc. R. 38, Q. & A. 14; R. 39-40, Q. & A. 1-4; R. 47-8, Q. & A. 18-26; R. 69-70, Q. & A. 11; R. 71, Q. & A. 19; R. 80-81, Q. & A. 3-9 and 19; R. 81-2, Q. & A. 15-26; R. 26, Q. & A. 24. These matters, however, seem to be now unimportant, in view of the admission of no independent contractor relationship (petition, page 5) and that Capital was merely the lessee or hirer of the bus and driver.

6.

ALLEGED REASONS FOR ALLOWANCE OF THE WRIT.

1.

It is said that the Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court. Petition, page 11.

Our answer is that the Courts below have decided no Federal question whatever. They have decided a question of contract—of insurance law. They have merely said that **as between themselves** an insurance company and a common carrier may make such contract as they wish, and that some "other insured", under an omnibus clause, shall not take greater benefits than the original insured would have taken. See opinion of District Judge, R. 116-120; R. 124, pars. 6 and 7; R. 128, 129; judgment, R. 131-133; judgment of Court of Appeals, R. 145-6.

2.

It is said (petition, page 11) that the Court of Appeals decided a question of local law contrary to applicable local decisions and decisions of this Court, in that, in general, the Court of Appeals has construed Pennsylvania's policy, including the endorsement, **in its favor**, rather than against it.

There is no such conflict of decision.

The rule justifying construction of any ambiguity in a policy against the company issuing it is based on the theory that the insurer prepares the policy, uses its own terms or language, and gives the insured, usually, no option but to "take it or leave it." In this case, the Interstate Commerce Commission directed the use of the

endorsement—the insurer had no choice. See 49 U. S. C. A., Section 315; 49 C. F. R., Section 174.7; endorsement, quoted R. 117-118.

But what is said about construction is immaterial, since the bus was unquestionably not being used under Cherokee's permit or certificate at the time of the accident. See opinion, R. 116-120, and provision in endorsement, R. 117:

> " . . . resulting from the negligent operation, maintenance or use of motor vehicles **under certificate** of public convenience and necessity **issued to the insured** by the Interstate Commerce Commission," etc.

3.

The third alleged reason (page 12 of petition) is so general and vague that no reply can be made to it.

4-5.

It is said (same page) that the Courts below went outside the pleadings and proof to find a foundation for the judgment.

This alleged reason is based on what the District Judge said on R. 119 about reimbursement. It will be observed that this statement was only incidental, and made by the Judge for the purpose of fortifying his conclusion as to the $10,000.00 limit; for he immediately said this:

> "Clearly the endorsement contemplates that the original policy limit would remain in force."

This reimbursement theory is not mentioned elsewhere in the record.

The above matters are discussed more fully hereinafter. We merely say here, and now, that the "reasons relied on" for granting the writ (pages 11-12) are without foundation.

7.

ARGUMENT.

POINT A.

Adversary counsel quote (brief, page 24) **Liberty Mutual Ins. Co. v. McDonald,** 97 F. 2d 497, for the proposition that statutory provisions extend, if necessary, an insurance contract in favor of public security, and that the amounts set out are minimum and not maximum coverages. We do not contend otherwise. But public security is no longer involved. This is litigation between two insurance companies, involving no statute, but to which ordinary rules of law and equity are applicable.

On page 25 there is an expression that "in wording its endorsement" Pennsylvania refused to limit the application of the policy. Adversary counsel should not have been unmindful of the fact that this endorsement is **required** by 49 U. S. C. A., Section 315, and 49 C. F. R., Section 174.7, where it is said:

> "Endorsements for policies of insurance . . . all must be in the forms prescribed and approved by the Commission."

This requirement was called to their attention in the reply to the petition to rehear, R. 178. It is, therefore, improper to say (page 26) that Pennsylvania "by its own action and its own choice of terms" used any words instead of others, or purposely extended coverage beyond the scope of the act. It is, too, we insist, improper for adversary counsel to say (page 29) with respect to a statement in the endorsement:

> "as it appeared in the endorsement prepared, printed and completed by the insurance company," etc.

Pennsylvania merely adopted the form required by applicable law.

It is said (page 26) that Pennsylvania could have limited the policy and **excepted** injuries or deaths outside the scope of the permit or certificate. This would have been in violation of the I. C. C. requirement. See Defendant's Exhibit 4, material part quoted, R. 117-118.

The expression "or elsewhere" contemplates a lawful deviation, such as mentioned in 49 U. S. C. A., Section 308 (b)—"may occasionally deviate from the route over which . . . it is authorized to operate," etc. In Section 308 (c) there are provisions for transportation of charter parties to "any place," such place not being required to be on any designated route. (The charter party theory on behalf of petitioner has been abandoned, petition, page 5.)

Inasmuch, however, as the bus involved was **not** being operated **"under certificate of public convenience and necessity or permit issued to the insured by the Interstate Commerce Commission,"** R. 117, center of page, it is not material that no exceptions were made. The expression there found "or otherwise under the Interstate Commerce Act" refers to the uses mentioned in Sections 308 (b) and 308 (c) of 49 U. S. C. A. See discussion of this matter by the District Judge, R. 116-120, where it is said, R. 119:

> "Under the endorsement there arises no liability unless the vehicle is being operated under the permit issued to the named insured motor carrier."

POINT B.

It is said (brief, page 27) that an important question of Federal law has not been, but should be, settled; and that the Court of Appeals, in effect, said that such an endorsement as that involved should be construed in favor of the company issuing the policy.

We find no such construction and adversary counsel point to none.

The quotation (page 27) from **Railroad Company v. Schutte**, 103 U. S. 118, 140, is beside the point. We have here an insurance policy, with the statutory endorsement. As the bus was not being operated under the permit issued to its owners, the endorsement, **by its terms**, was ineffective. No statute was involved for construction with the policy. There remained, then, only the question as to whether the limitation of Pennsylvania's policy was effective. No reason has ever been suggested by adversary counsel why Pennsylvania and Cherokee, **as between themselves**, could not enter into any such contract as they chose, and no such reason exists. Construing this Pennsylvania policy, minus the endorsement, "according to the sense and meaning of the terms which the parties have used," the maximum liability is $10,000.00. **Capital, as additional or other insured, could not have greater rights than the original insured.**

It is apparent from the pleadings and the entire record that Capital and American have no theory, and never did have any theory, of taking under the policy of Pennsylvania otherwise than under the omnibus clause. Capital was not named as an insured in Defendant's Exhibit 4.

POINT C.

This is somewhat vague (brief, page 28) but the substance seems to be that the lower Courts have given the policy and endorsement one construction, whereas under state law a different result is required—in a case of doubt a provision in an insurance policy must be construed most strongly against the company issuing it.

The rule, when applicable, is based upon the theory that, having chosen the words or expressions, and having usually given the other party no option except to accept or reject them, it is equitable, in case of ambiguity, to construe the policy against the company.

But, in the present case, it must be borne in mind that the company did not choose the words of the endorsement. It was, with it, a case of accept the endorsement or not write the business. The reason for the rule of construction is absent; hence the rule cannot be applied.

We find no fault with the authorities quoted on pages 28-29 of the petition and brief.

It seems to us, however, that this argument about the restricted or extended meaning of the term "the insured" is not material.

It is clear that the original maximum limit of Pennsylvania's policy was $10,000.00 for multiple injuries or deaths. See Defendant's Exhibit 4; also R. 116 et seq. This maximum is not claimed by adversary counsel to have been extended otherwise than by the I. C. C. endorsement above mentioned, quoted R. 117.

It is not claimed that Capital took anything under Pennsylvania's policy except under the omnibus clause, quoted R. 113.

It cannot be contended, with any logic or reason, that Capital, as an additional insured, took greater rights than did the original insured.

The following in the endorsement, R. 118, is therefore pertinent:

> "The insured agrees **to reimburse** the Company for any payment made by the Company on account of any accident, claim or suit involving a breach of the terms of the policy and for any payment that the company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement."

Any additional or other insured would therefore be under the obligation to **refund** or **reimburse**, just the same as the original insured.

This also bears out what has been said hereinbefore to the effect that so far as public security is concerned the statute controls, but with respect to dealings between the parties they may contract as they choose; and it shows that whether the word "insured" be given the same or a different meaning the results are the same.

No **insured,** whether **original** or **additional,** could ever take more than $10,000.00 under Pennsylvania's policy.

POINT D.

We agree that the rules of construction laid down in Point D, page 30 of brief, are proper when applicable. They are of no significance here.

POINT E.

It is said, page 31 of the brief, that the decision below, at least in substantial part, was based on an issue not included in the pleadings, or contemplated by the parties; that is, in effect, a reimbursement was required by Capital to Pennsylvania, on an issue not involved. The reimbursement provision is quoted under Point C hereof.

Petitioner's contention is based on what the District Judge said, on R. 119, as follows:

> "This endorsement would not have the effect of abrogating or superseding the original policy limits as the endorsement expressly provides for reimbursement to the insurer ' . . . **for any payment that the company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.**' (Emphasis added.) Clearly this endorsement contemplates that the original policy limits would remain in force."

From the context it is clear that the District Judge was merely using this provision and this quotation to fortify

his opinion that the original policy limits prevailed as among the parties to this suit.

No reimbursement theory was advanced otherwise in the opinion, R. 111-120; or in the findings of fact and conclusions of law, R. 120-124; or in the memorandum for settlement of the judgment, R. 127, or in the judgment itself, R. 131-133. The matter was mentioned only incidentally, and for another purpose.

As to the pleadings and theories advanced in them, it is true that American and Capital claimed that Pennsylvania and Cherokee were liable to the extent of $50,000.00. Brief, p. 31. In the answer, the defendants denied liability on account of the accident, R. 7. During the course of the settlements, a stipulation was entered into "that the parties all reserved the right to sue each other, and that 'all questions as to primary insurance, excess insurance, etc., and the rights of all parties with respect to such matters' should remain open." R. 9. It was averred that "Capital was primarily liable for all such damages." R. 10. It was alleged that Pennsylvania "had no liability whatsoever under said policy." Defendants denied owing anything. R. 10. They filed a counterclaim for $47,356.77 and $2800.00. R. 11. It was charged that the "complainants were and are liable for all amounts which have heretofore been paid out or may hereafter be paid out." R. 11. It was denied that Pennsylvania's policy constituted concurrent insurance. R. 13. It was said that if the Court should so hold, that then Pennsylvania would only be liable for one-half. R. 13. Defendants prayed for judgment for the sums aforesaid. R. 13-15.

The policies were before the Court.

The District Court did not grant a judgment against American for $47,356.77, but, after deducting the $10,000.00 above mentioned, and making minor adjustments, rendered a judgment for $37,032.08. R. 132.

It therefore cannot be said that the judgment for $10,000.00 less than what Pennsylvania insisted was due it is outside of or beyond the pleadings or the evidence.

It is said on page 32 that this reimbursement clause is not clear, and that to give this issue consideration the Court should have had more information.

In the first place, there is no ambiguity. The clause has been quoted hereinbefore. See, also, R. 118. It merely says, so far as this case is concerned, that if Pennsylvania pays out more by reason of the endorsement than it would have been required to pay without the endorsement, the insured will reimburse it for the difference. There is nothing complicated about that.

In the second place, there was no issue to be considered. The Court merely mentioned this matter incidentally to bolster his theory that the original limit of $10,000.00 should apply as between the insurance companies. See R. 119.

POINT F.

What we have said above is, we believe, a complete answer to Point F. There was no issue outside the pleadings and proof. The cases cited under this Point are therefore immaterial.

ADVERSARY'S CONCLUSION.

The illustration given in this conclusion is entirely beside the point. It may well be that there will be accidents, with common carriers as well as individual motorists, where there is not enough insurance to pay the damages. Had Cherokee been operating this bus in question under its I. C. C. permit and passengers had been injured, the limit for multiple injuries or deaths would have been $50,000.00. As it had merely let Capital have its bus and

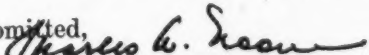
driver for this trip, the accident was Capital's accident, and it was primarily liable. The passengers had to look to Capital and its insurance company, primarily. Capital and American, by reason of Pennsylvania's policy, were relieved to the extent of the $10,000.00, of which they got the benefit under the omnibus clause.

CONCLUSION.

The only real question is, was the limit of $10,000.00 in Pennsylvania's policy effective? We insist that Cherokee could not have taken greater benefits under the policy; it is unreasonable to even insist that an additional or other insured could take greater benefits than could the original insured. Had Pennsylvania paid out anything over the $10,000.00 to passengers riding on a bus operated by Cherokee, then Cherokee would have been obligated to reimburse Pennsylvania for the difference. If Capital had an accident (as it did), American was to pay its passengers; but by reason of the omnibus clause American had other insurance to the extent of $10,000.00. It has been given credit for this $10,000.00. The judgment is for the difference. See R. 131-133.

For all the foregoing reasons, we insist the writ should be denied, and the judgments below thereby, in effect, affirmed. There is no Federal question; no question of importance; the judgment is correct on the merits.

Respectfully submitted,



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